

1-1-1975

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Recommended Citation

Albert, James A. (1975) "The Iowa Open Meetings Law," *Journal of Legislation*: Vol. 2: Iss. 1, Article 3.
Available at: <http://scholarship.law.nd.edu/jleg/vol2/iss1/3>

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THE IOWA OPEN MEETINGS LAW

James A. Albert

The second-largest city in Iowa is referred to by its chamber of commerce as 'the city of five seasons.' The residents of Cedar Rapids know, however, that four of those seasons are winter.

During the 1940's and 1950's, substantial thousands of Iowans in search of the sun formed an exodus to southern California. Such large-scale desertions prompted the retort by one sage Iowa Congressman that the average IQ's of both states had been sharply increased as a result.

The hearty souls who did stay behind were to see years later the State Legislature (in 1971) open up Iowa government and let the sun shine in, as brightly as a California sunrise.

But, readers and meteorologists, put away your sunglasses and let your euphoria be short-lived as there are clouds, albeit of the man-made variety, obscuring the sunshine of the Iowa Open Meetings law.

This article examines the Iowa Open Meetings law and suggests corrective amendments. The focus will be on the arrogant defiance of the law by the politically powerful Board of Supervisors of the second-largest county in the state.

The sixty-fourth General Assembly of the Iowa Legislature (1971) enacted what was heralded as a tough and comprehensive Open Meetings law. That statute, Chapter 28A of the 1971 Code of Iowa with attendant Sections 1 through 8, provides as follows:

CHAPTER 28A

OFFICIAL MEETINGS OPEN TO PUBLIC

28A.1 Closed meetings prohibited. All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

1. Any board, council, or commission created or authorized by the laws of this state.

2. Any board, council, commission, trustees, or governing body of any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state.

3. Any committee of any such board, council, commission, trustees, or governing body.

Wherever used in this chapter, "public agency" or "public agencies" includes all of the foregoing, and "meeting" or "meetings" includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal. [C71, § 28A.1]

28A.2 Citizen's right to be present. Every citizen of Iowa shall have the right to be present at any such meeting. However, any public agency may make and enforce reasonable rules and regulations for conduct of persons attending its meetings and situations where there is not enough room for all citizens who wish to attend a meeting. [C71, § 28A.2]

28A.3 Closed session by vote of members. Any public agency may hold a closed session by affirmative vote of two-thirds of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such reason need not state the name of any individual or the details of the matter discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some other provision of the Code expressly permits such action to be taken in a closed session. No regular or general practice or pattern of holding closed sessions shall be permitted. [C71, § 28A.3]

28A.4 Advance notice of meetings. Each public agency shall give advance public notice of the time and place of each meeting, by notifying the communications media or in some other way which gives reasonable notice to the public. When it is necessary to hold an emergency meeting without notice, the nature of the emergency shall be stated in the minutes. [C71, § 28A.4]

28A.5 Minutes kept. Each public agency shall keep minutes of all its meetings showing the time and place, the members present, and the action taken at each meeting. The minutes shall be public records open to public inspection. [C71, § 28A.5]

28A.6 Exceptions. This chapter does not apply to any court, jury, or military organization. [C71, § 28A.6]

28A.7 Mandamus or injunction. The provisions of this chapter may be enforced by mandamus or injunction, whether or not any other remedy is also available. [C71, § 28A.7]

28A.8 Penalty. Any person knowingly violating or attempting to violate any provision of this chapter shall

be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one hundred dollars. [C71, § 28A.8]

The legislative intent of Chapter 28A is manifest. However, the protection and benefits intended have been denied in certain instances. The flagrant disregard of Chapter 28A by the elected county executives (in Iowa, the three-member Board of Supervisors) of the second-largest county in Iowa provides an illuminating study into the practical application or, more correctly, inapplication of this statute.

During the week of January 7, 1973, the Linn County Board of Supervisors held an unannounced and completely closed meeting. At that meeting, decisions were made to radically alter the direction of the County Conservation Board. Such revamping included a decision to force the resignations of present Conservation Commission members and substitute certain members or member of the Linn County Democratic Central Committee.

This meeting was unannounced to the news media and closed to the public.

On January 22, 1973, the Linn County Health Center Board conducted a closed meeting. The meeting was closed to the public without compliance with Section 28A.3, requiring a two-thirds vote to so close the meeting.

Also questionable in this instance was the motive for the particular timing of this closed meeting. At the meeting the resignation of Edward F. Hanlon, Jr. as Executive Director of the Linn County Health Center was forced.

However, two of the three hold-over charter members of the Health Center Board were away on vacation at the time, no indication at all was given to the hold-over members of the intention to dump Hanlon at the meeting, and the Health Center Board had been altered three weeks earlier with the addition of three new appointees by the all-Democratic Board of Supervisors.

On June 1, 1973, the Board of Supervisors engaged in yet another closed-door meeting with other health officials present. The closed session lasted three hours and resulted in the Supervisors' modification of their prior controversial decision to pay a yearly salary of \$54,000 to a county health officer they had recently appointed.

The Des Moines Register, in a June 2, 1973, article reported on the meeting thusly:

The Linn County Board of Supervisors Friday backed off from its controversial move to pay the new medical director of the county mental health department \$54,000 a year and cut the pay to \$42,000.

The \$1,000-a-month pay cut for Dr. Paul Penningroth, a psychiatrist, was announced after a closed-door, three-hour meeting between Dr. Penningroth, the supervisors, and other health officials.

The \$54,000 salary, announced May 8, brought protests from state legislators and the general public. Critics pointed out that it was apparently higher than that of any public employee in Iowa and higher than top mental health administrators in the federal government.

Credit the Cedar Rapids news media, and especially the Cedar Rapids Gazette and its Associate Editor Frank Nye, with a vigorous and forceful response to the rank violations by the Supervisors of the Open Meetings Law:

This made the Supervisors and the Conservation Board the latest local tax-using bodies to flout the open meetings laws of Iowa in clear defiance of the public interest. . . . One reason for what seems to be a remarkable state of ignorance or disrespect for these provisions may be that even when demonstrable violations come to light, enforcement never swings into action and prosecutions never follow. (January 14, 1973 Editorial)

Chicago style: is success going to the heads of some Linn County Democrats, now that they control the courthouse 100 percent for the first time since the Good Lord knows when? No sooner did the Democrats take over than the new Board of Supervisors closes the doors to its meeting and demands resignations from members of the County Conservation Board Some longtime Democrats are disappointed in the Mayor Daley approach to politics some courthouse Democrats are practicing. (Political Notes column, February 11, 1973, by Frank Nye)

However, the response of the law to these clear violations was neither forceful nor vigorous. Rather, it was illusory at best.

The Linn County Attorney, fellow Democrat William Faches, refused to file charges against the three members of the Board of Supervisors despite a formal request from a Linn County citizen, Mr. Stephen Ridge.

In refusing to file charges, the County Attorney told reporters that his personal policy concerning such law infractions was to "inform groups about the pertinent law before bringing charges against them."¹

To advance the issue ad absurdum, the County Attorney advised, however, that he was scheduling a meeting with the chairmen of some of the agencies accused of open meetings violations to discuss the matter with them. "Asked whether this meeting would be open to the public and press, he said it would not. He said the open meetings law does not cover that type of gathering of chairmen of public agencies."²

Certainly, Faches' personal political interpretation of 28A contradicts the letter and spirit of the law. An official meeting of members and officers of the very public agencies covered by Sections 28A.1, 1, 2, and 3 is inescapably within the scope of 28A.

So, instead of prosecution from the County Attorney, what did the people of Linn County get? Yet another violation of the Open Meetings Law!

The poignant Gazette editorial of January 14, 1973, referred to the fact that "enforcement never swings into action and prosecutions never follow."

Yet, when the Attorney General of Iowa reviewed Chapter 28A prefatory to a 1971 Attorney General's Opinion,³ he observed:

Our General Assembly has by these enactments established and given force to a public policy of guaranteeing the people full and complete knowledge of governmental affairs. . . . The General Assembly has enacted a guarantee not known to the common law, that public bodies, boards, councils, and commissions shall deliberate, make their decisions and conduct their business in public. The Legislature has recognized that equity or the public interest will, from time to time, require confidentiality. But as the statutory requirements of public access and observation are precatory and broad, the exceptions are precise and narrow.

Just why is it that, as the Gazette analyzed, "enforcement never swings into action and prosecutions never follow"? Why is this statute ineffective?

As a result of anatomical deficiencies, this Open Meetings law did not stand strongly vigilant to prevent the four violations enumerated above. It could not fairly be said, as did President Theodore Roosevelt of a judicial appointment he made but later lamented, that "out of a banana, one with more spine could've been carved." This law does have spine. However, it lacks teeth.

The flouting of this statute in Linn County evidenced its inadequacies:

- 1) The incentives which may appear to a local governing body to justify a closed, illegal meeting are not removed.
- 2) The enforcement mechanism, relying on an aggrieved citizen initiating a suit for mandamus or injunction, in practical application is little deterrent to potential offenders given the reluctance of citizens to become so distraught by violations that they are moved to undergo the trepidations of initiating a lawsuit against the politically powerful in their hometown.

As there remains a question whether or not enforcement of the law will ever be prompted, the deterrent effect is no greater to potential

closed, secret meetings than the deterrent to any potential criminal who faces uncertain, doubtful prosecution.

- 3) The penalty provision, subjecting a violator to the diminutive fine of not more than \$100, is so trifling and paltry as to be of little deterrent or exemplary effect.

It wrenches the mind to believe that the prospect of a \$1 to \$100 fine, when weighed by the potential violator against the advantages of a secret \$54,000 boondoggle or political maneuvering to perpetuate one-party control in a county generates more than a blink.

Add to that the wink generated by the prospect that the County Attorney, if of the same political persuasion, might not prosecute at all, or the doubtful intervention of an aggrieved citizen into the legal labyrinth to expose the violation, and the deterrent effect--when viewed from the eyes of a potential violator--evaporates.

Chapter 28A must be decisively amended to correct the shortcomings outlined. The following three proposed amendments would rehabilitate the statute:

AMENDMENT A

Chapter 28A, Code of Iowa 1971, is amended by adding the following new section.

All public meetings subject to the inclusionary provisions of 28A.1 are declared to be public meetings open to the public at all times. No resolution, rule, regulation, or formal action shall be considered binding except as taken or made at such an open, public meeting.

Any agency action taken in contravention to this Chapter is per se void, a legal nullity.

RATIONALE: This amendment removes any incentive to conduct business in closed meetings.

By voiding per se actions taken in violation of the Open Meetings law, the conduct of any closed meeting would be without effect, frivolous, and a simple waste of time even if attended.

In practical operation, this amendment would swiftly emasculate any illegal action taken--without the delay and uncertainty of whether enforcement of the existing statute would even be undertaken.

AMENDMENT B

Chapter 28A, Code of Iowa 1971, is amended by adding the following new section.

Members of a public agency attending closed meetings in violation of the provisions of this Chapter shall be jointly and severally liable for illegal agency action.

A cause of action based on this liability may be brought in a competent state court by any aggrieved citizen residing within the jurisdiction of the particular agency.

An agency member thus subject to these provisions shall be liable for actual or punitive damages or both.

RATIONALE: This amendment adds teeth to the penalty provision by providing a civil penalty option for violation of the law.

The basis of this amendment is accountability. Forward from date of adoption, the public official is civilly accountable for his violation of the Open Meetings law.

It is conceded that actual damages would be difficult to prove and likely to be nominal; but punitive damages could prove more of a deterrent than any other single arrow in the quiver of enforcement options.

AMENDMENT C

Chapter 28A, Code of Iowa 1971, is amended by adding the following new section.

It is the public policy of the State of Iowa, with narrow exceptions noted in 28A.3, that public business is to be conducted in public.

Rule of construction: the provisions of this Chapter are to be construed so as to frustrate all evasive devices.

RATIONALE: This amendment clarifies and focuses the purpose of the entire statute by declaring unequivocally that public policy strongly favors open meetings.

The rule of construction is intended to guide judges faced with evasive maneuvers not specifically enumerated in the bill but nonetheless calculated to frustrate its purposes..

The result here is simply to make statutorily clear what numerous Attorney General's opinions have interpreted as the public policy with respect to open meetings.

In distinctly understandable terms, designed to put all levels of public agencies on notice as to the policy of the state, this wording can leave little doubt in the mind of any official--be he township clerk of the smallest township or County Attorney of the largest county.

Conclusion

The specter of the Board of Supervisors of the second-largest county in the state notoriously and repeatedly violating the express provisions of the Open Meetings Law, yet defiantly eluding apprehension is sobering.

The significance of such a shocking case study is far-reaching and goes to the very issue of public confidence in our legal system. Such blatant violations of the law by the politically unchecked in a one-party courthouse, such unbridled abuse of power should offend the consciences of all fair-minded people.

At the time these abuses manifested themselves, the public outrage should have been vociferous. That it was not, that such illegality was acquiesced to by the public, is a sad commentary on the worn sensitivities of the beleaguered citizen.

Chapter 28A must be strengthened to the point that never again will politically powerful mis-representatives of the people defy its reach.

Footnotes

1. Article, The Cedar Rapids Gazette, February 6, 1973, p. 3.
2. Ibid.
3. Iowa Attorney General's opinion, number 71-6-11, June 6, 1971 (Attorney General Turner to Supt. Johnston.)

Background Sources

1. Iowa Attorney General's opinion, number 70-9-11, September 17, 1970 (Asst. Attorney General Nolan to Story County Attorney)
2. Iowa Attorney General's opinion, number 71-4-19, April 22, 1971 (Asst. Attorney General Hughes to State Nursing Board)
3. Iowa Attorney General's opinion, number 69-10-3, October 13, 1969 (Asst. Attorney General Nolan to Fayette County Attorney)
4. Iowa Attorney General's opinion, number 69-12-22, December 30, 1969 (Attorney General Turner to Governor Ray's office)
5. "The Florida Sunshine Law," § 286.11, Florida Statutes Ann.
6. "Open Meetings Ignorance," The Cedar Rapids Gazette, January 14, 1973, editorial
7. "Meeting Called Illegal," The Cedar Rapids Gazette, January 26, 1973
8. "Three Resign in Fuss," The Cedar Rapids Gazette, February 6, 1973
9. "Political Notes," The Cedar Rapids Gazette, February 11, 1973
10. "Disputed Pay Cut," Des Moines Register, June 2, 1973
11. "Mental Care Shift," Des Moines Register, April 20, 1973